United Oriental Assurance Sdn Bhd v Lim Eng Yew

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 315 OF 1988
ABDUL HAMID OMAR LP, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
6 SEPTEMBER 1991

Contract — Commercial vehicle insurance policy with third party risks — Construction of — Plaintiff injured while travelling in a lorry as a passenger pursuant to a contract of employment between him and owner of lorry — Judgment for damages obtained against driver of lorry — Whether insurers liable to satisfy judgment — Road Traffic Ordinance 1958, ss 74, 75 & 80

Insurance — Commercial vehicle policy — Insurance with third party risks — Plaintiff injured while travelling in a lorry as a passenger pursuant to contract of employment between him and owner of lorry — Judgment for damages obtained against driver of lorry — Whether insurers liable to satisfy judgment — Road Traffic Ordinance 1958, ss 74, 75 & 80

In this case, the plaintiff/respondent was an employee of one Lim Yoke Pak ('Lim'). The plaintiff sustained severe personal injuries when the lorry in which he was travelling met with an accident. At the time of the accident, the plaintiff was being carried as a passenger in the said lorry pursuant to a contract of employment between him and the owner of the lorry, Lim. The lorry was covered by an insurance policy with third party risks issued by the defendant/appellant. The plaintiff obtained judgment against the driver of the lorry for damages, interest and costs and demanded payment of the judgment sum from the defendant who denied liability. Judgment was given for the plaintiff in the High Court and the defendant appealed.

Held, dismissing the defendant's appeal:

(1) In this case, the plaintiff was working as a salesman for the registered owner of the said lorry, Lim, and was required by his contract of employment with Lim to travel on the said lorry.

(2) In the circumstances the learned trial judge was right in deciding that, upon a proper construction of the policy of insurance and ss 75(1) and 80(1) of the Road Traffic Ordinance 1958, the defendant was liable to pay the plaintiff the amount due under the judgment.

[Bahasa Malaysia summary

Di dalam kes ini, plaintif/responden adalah pekerja seorang bernama Lim Yoke Pak ('Lim'). Plaintif telah mengalami cedera parah di dalam suatu kemalangan jalan raya ketika ia menumpang di lori kepunyaan Lim yang dipandu oleh seorang pemandu yang juga bekerja dengan Lim. Pada masa kemalangan itu ia telah dibawa sebagai penumpang di dalam lori itu mengikut kontrak pekerjaan antaranya dan Lim, yang mempunyai lori itu. Plaintif telah mendapat penghakiman ganti rugi, bunga dan kos terhadap pemandu lori itu dan telah meminta bayaran penghakiman daripada defendan/perayu yang menjadi penanggung insurans lori itu terhadap risiko pihak ketiga. Plaintif telah menafikan tanggungannya. Di Mahkamah Tinggi, penghakiman telah diberi kepada plaintif dan defendan telah membuat rayuan.

Diputuskan, menolak rayuan defendan itu:

(1) Di dalam kes ini, plaintif telah bekerja sebagai jurujual tuan punya berdaftar lori itu, Lim, dan ia dikehendaki, mengikut kontrak pekerjaannya dengan majikannya, Lim, menggunakan lori itu.

(2) Di dalam keadaan itu, hakim yang arif dengan betul memutuskan bahawa, atas tafsiran sewajarnya polisi insurans itu dan ss 75(1) dan 80(1) Ordinan Lalulintas Jalan 1958, adalah tanggungan defendan untuk membayar kepada plaintif jumlah wang yang perlu dibayar di bawah penghakiman itu.]

Cases referred to

1 *Chan Kum Fook & Ors* v *Welfare Insurance Co Ltd* [1975] 2 MLJ 184 (follid)
2 *China Insurance Co Ltd* v *Teh Lain Lee & Anor* [1977] 1 MLJ 1 (follid)
3 *Tan Keng Hong & Anor* v *Fatimah bte Abdullah & Ors* [1974] 1 MLJ 156 (distd)
4 *Saw Poh Wah* v *Ooi Kean Hang & Anor (Asia Insurance Co Ltd, Third Party)* [1985] 2 MLJ 387 (distd)
5 *Lees* v *Motor Insurers Bureau* [1952] 2 All ER 511 (distd)
6 *Richards* v *Cox* [1942] 2 All ER 624 (follid)
7 *Vandyke* v *Fender & Anor, Sun Insurance Office Ltd (Third Party)* [1970] 2 QB 292 (refd)
8 *Tan Keng Hong & Anor* v *New India Assurance Co Ltd* [1978] 1 MLJ 97 (distd)
9 *Izzard* v *Universal Insurance Co Ltd* [1937] AC 773 (refd)

Legislation referred to

Road Traffic Ordinance 1958 ss 74, 75, 80
Road Traffic Act 1930 [UK] ss 35, 36
Road Traffic Act 1960 [UK] s 203(4)

Appeal from: Civil Suit No P 395 of 1980 (High Court, Kuala Lumpur)

S Radhakrishnan for the defendant/appellant.
Dato' Wong Soon Foh for the plaintiff/respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): This was a claim by one Lim Eng Yew ('the plaintiff'), who was an employee of one Lim Yoke Pak t/a Chop Pak Kee, a sundry wholesaler, pursuant to the provisions of s 80(1) of the Road Traffic Ordinance 1958 ('the Ordinance'), concerning the duty of insurers to satisfy judgments against persons insured in respect of third party risks.

The said Lim Yoke Pak was the registered owner of a motor lorry No AL 1577 ('the said vehicle'), which had a 'C' carrier's licence and was insured with third party risks under a commercial vehicle policy issued by the Oriental Fire and General Co Ltd, the predecessor of the United Oriental Assurance Sdn Bhd ('the defendant'), for the period 1 May 1972 to 30 April 1973.

On 26 June 1972, the plaintiff sustained severe personal injuries when the said vehicle driven by one Lim See Keong as servant or agent of the said Lim Yoke Pak went off the road and landed in a ditch. At the time of the accident, the plaintiff was being carried as a passenger in the said lorry pursuant to a contract of employment between him and the owner of the lorry, the said Lim Yoke Pak.

On 7 June 1977, the plaintiff sued Lim See Keong, the authorized driver of the lorry at the time of the accident, and on 15 June 1978, he obtained judgment against him for damages arising out of the accident in the sum of $120,000 being general and special damages with interest and costs. Costs were subsequently agreed at $3,000 in lieu of taxation. On 18 April 1979, the plaintiff through a firm of solicitors served a notice on M/s Shearn Delamore & Co, the solicitors for the defendant, demanding payment of the judgment sum, and on 26 April 1979, M/s Shearn Delamore & Co replied that there was no liability on the part of their client, the defendant.

In the court below, when the learned judge gave judgment for the plaintiff, he referred to the exceptions to Section II of the said policy on liability to third party, which provided, inter alia, as follows:

> The company shall not be liable in respect of
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> (i) death bodily injury or damages caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading therefrom
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment
> (iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of occurrence of the event out of which any claim arises.

The learned judge was of the opinion that the above-quoted exception (iii) to the exceptions to Section II above made the defendant liable because the plaintiff was 'a passenger carried by reason of or in pursuance of a contract of employment'. He relief on the Singapore High Court cases of *Chan Kum Fook & Ors* v *Welfare Insurance Co Ltd*,[1] in which case Tan Ah Tah J, in construing a similar clause in a policy issued by the defendants in that case, held that the effect of the words in exception (iii), ie 'other than a passenger carried by reason of or in pursuance of a contract of employment' is to make the defendants liable in respect of injuries sustained by the plaintiffs who were passengers 'carried by reason of or in pursuance of a contract of employment'. Ajaib Singh J, as he then was, in this case also relied on *China Insurance Co Ltd* v *Teh Lain Lee & Anor*,[2] in which the Singapore Court of Appeal, in dismissing an appeal against the judgment of D'Cotta J in the High Court, held, inter alia, that the words (in exception (iii), ie 'other than a passenger carried by reason of or in pursuance of a contract of employment') were to make the defendants in that case liable as a result of the death of the deceased because at that time the deceased was being 'carried by reason of or in pursuance of a contract of employment'. In that case, the Singapore Court of Appeal referred to and approved the High Court decision in Tan Ah Tah J's judgment in *Chan Kum Fook & Ors* v *Welfare Insurance Co Ltd*.[1] It is to be noted that ss 4(3) and 8(1) of the Singapore Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 88, 1970 Ed) referred to in those Singapore cases are in pari materia with ss 75(1) and 80(1) of the Ordinance.

Now s 80(1) of the Ordinance refers to s 75 of the Ordinance concerning the requirements in respect of policies in respect of third party risks. For the purposes of this appeal, it is relevant to refer to the following provisions of s 75(1) of the Ordinance:

> In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —
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> (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and
> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:
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> Provided that such policy shall not be required to cover —
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> (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
> (ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or
> (iii) any contractual liability.

It will be noticed from the above-quoted s 75(1) of the Ordinance that the proviso states that such policy shall not be required to cover liability in respect of death arising out of and in the course of his employment of a person insured by the policy or *except* in the case of a motor vehicle in which passengers are carried for hire or reward *or by reason of or in pursuance of a contract of employment.*

During his submission before us, Mr Radhakrishnan, counsel for the defendant, referred to *Tan Keng Hong & Anor* v *Fatimah bte Abdullah & Ors*.[3] That was also a case involving a lorry insured by insurers under a third party policy which excepted liability for death caused to any person carried on the vehicle (other than a passenger carried by reason of or in pursuance of a contract of employment). A deceased person who was

getting a free lift on the lorry was killed when the lorry overturned. The Federal Court, in dismissing an appeal to it, held that as it appeared in that case that the deceased was getting a free lift on the lorry, the learned trial judge was right in holding that the insurers were not liable under the policy to indemnify the appellants who were the driver and owner of the lorry.

We were also referred by counsel to *Saw Poh Wah* v *Ooi Kean Hang & Anor (Asia Insurance Co Ltd, Third Party)*.[4] That was again a case involving an insurance policy with a similar clause which excludes liability of the insurance company in respect of death of any person (other than a passenger carried by reason of or in pursuance of a contract of employment). In that case, Syed Agil Barakbah J, as he then was, held that the plaintiff, who was at all material times employed by the registered owner of the vehicle as an attendant, was covered by the insurance policy and that the insurer as third party should therefore indemnify the owner of the lorry and his driver on the judgment entered for the plaintiff. The third party, ie the insurance company, appealed against the said decision and the Federal Court allowed the appeal of the insurer without delivering a written judgment. The Federal Court held that there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger and, as such, the learned judge should have held that the relevant clause of the policy applied and the insurer was not liable to indemnify the defendants. That case is again distinguishable from the present one in that the learned judge there had made a finding of fact that the lorry attendant was not a passenger whereas, in our present case, the learned judge held that the plaintiff was 'a passenger carried by reason of and in pursuance of a contract of employment'. Dato' Wong Soon Foh, counsel for the plaintiff, merely referred to the exceptions to Section II of the said policy and contended that the above-quoted exception (ii) did not apply and that exception (iii) applied in this case. He also pointed out that the facts in the two above-quoted Malaysian cases were distinguishable from the present one.

Now it is interesting to refer to the following passage at pp 513-514 in the judgment of Lord Goddard CJ in *Lees* v *Motor Insurers Bureau*,[5] which was a decision concerning ss 35(1) and 36(1)(b) of the former UK Road Traffic Act 1930, which provisions are in pari materia with ss 74(1) and 75(1)(b) of our Ordinance:

> In *Richards* v *Cox* [1942] 2 All ER 624 the same state of affairs arose as is present here, the person injured and the driver of the car being both in the employ of the owner of the car. The driver was negligent, and the plaintiff recovered damages in an action against him. The question then arose whether the policy obliged the underwriters to indemnify the driver, and it was held that it did by reason of its terms which provided:
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> 'In terms of and subject to the limitations of and for the purposes of this section the company will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission provided (a) that such person is, not entitled to indemnity under any other policy.'
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> It was held that there were in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver. The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of policy insured the driver himself, and as the injured person was not a servant of the driver, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay.

In *Lees*'s case,[5] Lord Goddard CJ did not find any such term in the policy and he was unable to hold in that case that there was not a policy in force which complied with the Act of 1930 and covered all the persons whom the Act required to be covered, but it excluded liability in respect of the employees of the insured, and the underwriters were entitled to exclude that liability under the proviso to s 36(1)(b). It is therefore necessary in each case to examine the wording of the policy in question and in our present case, we have examined the policy issued by the defendant and we found the following important provision in it:

> 2 In terms of and subject to the limitations of and for the purposes of this section the company will indemnify any authorized driver who is driving the motor vehicle provided that such authorized driver —
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> (i) shall as though he were the insured observe fulfil and be subject to the terms of this policy insofar as they can apply
> (ii) is not entitled to indemnity under any other policy

which is practically identical with the relevant provision in the policy in *Richards* v *Cox*,[6] and which would oblige the defendant to indemnify the driver in this case, who was covered by the policy and was entitled to be indemnified by the defendant against the damages which he had to pay to the plaintiff.

Although the provisions of the present English Road Traffic Act 1960 are not in pari materia with those of the Ordinance, we would, however, refer to one English case decided under their present Act, namely, *Vandyke* v *Fender & Anor Sun Insurance Office Ltd (Third Party)*,[7] which is a decision under s 203(4) of the UK Road Traffic Act 1960. In that section, there appears the words 'shall not have effect in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment'. In that case, Lord Denning, Master of the Rolls, referred to those words and expressed the view that 'passengers are carried in a vehicle "by reason of" a contract of employment whenever such a contract is the cause or one of the causes, of their being carried. If they are

carried in it habitually or as a matter of practice, the vehicle must be covered in respect of them'. In that case, as the plaintiff was not obliged to travel in the car provided, the injury sustained by him did not arise out of or in the course of his employment and the UK Court of Appeal held that the third party insurers were not therefore liable to indemnify the employers.

Apart from the Malaysian cases quoted as well as the non-Malaysian cases which are of course persuasive authorities, there is another relevant case which should be considered, ie *Tan Keng Hong & Anor* v *New India Assurance Co Ltd.*[8] In that case, their Lordships of the Privy Council held in 1978 that the words 'by reason of his contract of employment' must be read in conjunction with the words 'in pursuance of', and properly construed, mean because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned. In that case, their Lordships referred to *Izzard* v *Universal Insurance Co Ltd*[9] and pointed out that Lord Wright, with whose speech Lords Atkin, Thankerton, Russell of Killowen and Roche agreed, said at p 782:

> I think the Act (the language of which is the same as that of the policy) is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons.

In *Tan Keng Hong*'s case,[8] the Privy Council pointed out that on the facts as found, the deceased forester was certainly not on the lorry for business reasons but for personal reasons, ie for his own personal convenience. In that case, there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the appellant's lorry and therefore the insurers were rightly held not to be liable under the policy. In our present case, the plaintiff was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle. He was therefore required by his contract of employment with his employer, the said Lim Yoke Pak, to travel on the lorry (vide the notes of evidence in pp 27 to 28 of the appeal records). In the circumstances of this case, we therefore consider that the learned judge was right in deciding that, upon a proper construction of the policy of insurance dated 19 May 1972, and ss 75(1) and 80(1) of the Ordinance, the defendant was liable to pay the plaintiff the amount due under the judgment dated 15 June 1978. We would therefore dismiss the appeal with costs.

There is, however, one observation which we ought to make which is that this suit was filed in June 1980 and was not heard by the High Court until more than seven years later on 17 September 1987. Judgment was finally delivered by the High Court on 27 June 1988. We would therefore urge all High Court judges who hear such claims for damages due to motor accidents to try these cases as early as possible so that a plaintiff who succeeds in getting damages as in this case would not have to wait for more than a decade before getting his compensation.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co; Chooi & Co.*

Reported by *Prof Ahmad Ibrahim*

Vije & Co v Co-operative Central Bank Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3-24-39-89
VC GEORGE J
21 MARCH 1991

Legal Profession — Solicitors' costs — Money standing to credit of client in solicitors' client account — Bills of costs delivered — No dispute over bills during material period — Solicitors setting off money in account against costs — Whether money in account is trust money — Whether solicitor entitled to set-off — Legal Profession Act 1976, ss 126 & 128 — Solicitors' Accounts Rules 1978, rr 7 & 15

Legal Profession — Solicitors' costs — Co-operative bank granting loans to members — Solicitors instructed to prepare loan documents — Solicitors instructed that solicitors' fees payable by members — Solicitors also instructed in some instances that bank not liable for any fees unpaid — Fees not paid by members — Whether solicitors entitled to raise bills against bank

Trusts and Trustees — Solicitors' client account — Money standing to credit of client in solicitors' client account — Whether solicitors trustees of money for client

Words and Phrases — 'Client's money' — Solicitors' Account Rules 1978, r 7

Words and Phrases — 'Trust money' — Solicitors' Account Rules 1978, r 7

The plaintiffs are a firm of advocates and solicitors. There was standing to the credit of the defendant, which was a co-operative bank, the sum of $317,562 in the plaintiffs' client account. The plaintiffs had acted as solicitors for a certain housing developer who owed the defendant substantial sums of money. Certain other clients of the plaintiffs, who were government servants, had entered into agreements with the developer to purchase houses to be built by the developer. The purchasers had borrowed the aggregate sum of $317,562 from the government to assist them in their respective purchases. The government paid this sum to the plaintiffs and the sum was credited to the plaintiffs' client account. They instructed the plaintiffs to pay the sum to the defendant upon certain undertakings being given. The undertakings were duly provided.

On 7 March 1989, the defendant was placed under receivership. Earlier, the plaintiffs had drawn out the sum of